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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 536

KATHRYN GENITE,

~~Appellant~~, Petitioner,

vs.

THE CIVIL SERVICE COMMISSION OF TOLEDO, OHIO,

and

Frank H. Foster, Jr., Chairman, Herbert K. Jorris, President, Calvin Hinkleman, Member, Donald L. Smith, Secretary, The Civil Service Commission of Toledo, Ohio,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JAMES F. BELL,
100 East Broad Street, Columbus, Ohio,
614-221-7863,
Counsel for Petitioner.

FRANK T. PIZZA,
Assistant Law Director,
Safety Building, Toledo, Ohio,
Counsel for Respondents.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on April 13, 1966.

CITATIONS TO OPINIONS BELOW

No opinions have been written by any of the three Ohio courts that have considered this case. The entry of the Supreme Court of Ohio dismissing the appeal for want of a

substantial Constitutional question is printed in Appendix B, *infra*, p. 15.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 13, 1966. Appendix B, *infra*, p. 15. Rehearing was denied on May 11, 1966. Appendix B, *infra*, p. 16. On July 7, 1966, the Honorable Potter Stewart, Associate Justice of this Court, ordered that the time for filing a petition for writ of certiorari be extended to and including September 12, 1966, Appendix B, *infra*, p. 17. The jurisdiction of this Court is invoked under 28 USC, Section 1257(3), and specifically under that portion thereof which pertains to petitioner's right and immunity under the Constitution of the United States.

QUESTION PRESENTED

Does the exclusionary rule of *Mapp v. Ohio*, 367 US 643, apply to evidence obtained as the result of an unreasonable search and seizure when offered before a municipal civil service commission for the purpose of proving charges for removal of a civil service employee?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fourth and Fourteenth Amendments to the Constitution of the United States. They are printed in Appendix, *infra*, p. 11.

STATEMENT

Prior to her removal, petitioner had been a Civil Service employee of the City of Toledo, Ohio, for more than a decade. On July 3, 1964, a day when petitioner was at home ill, one Arthur Schuster, a supervisor in the department where petitioner was employed, without the consent of petitioner and without having any authority therefor, searched

petitioner's desk and allegedly removed therefrom three small cards on which were certain notations claimed to pertain to horse race bets.

According to the testimony of Schuster, after having removed these cards from petitioner's desk, he showed them to one Allen Andrews, Director of Public Safety of the city, took them to the city print shop, made Xerox copies thereof, and returned the originals to petitioner's desk. *Petitioner was never advised as to what had taken place.* In fact, from that point on, what happened to these cards is as mysterious as what happened to the alleged search warrant that was forcibly taken from Dollree Mapp.

On July 8, 1964, petitioner was instructed by Schuster to accompany him to Director Andrews' office where she was questioned at length about the activities of "bookies" in Toledo. No mention was made to her at that time of the cards which had been removed from her desk. Mr. Andrews testified in regard to these cards: (Tr. p. 103)

> "Q. Why did you not hold the originals in your possession? A. Because this matter was under investigation and we wanted to return the originals to where they had been located, so that Miss Genite would not be suspicious that she was under investigation."

On July 20, 1964, Schuster wrote a letter to petitioner which reads, in part, as follows:

> "This is to advise that you are being relieved, effective immediately, from your position as Junior Clerk in the Inspection Department until further notice pending a hearing before the City Manager, *on the following charges:*
>
> "1. Conduct detrimental to the best interests and welfare of the City of Toledo and its employees, to-wit:
>
> "a. engaging in gambling during working hours while an employee of the City of Toledo.

"b. Use of the telephone in the Inspection Division offices during working hours to place bets on horse races with 'bookies.'" (Emphasis added.)

Petitioner's dismissal was affirmed by the City Manager and she appealed to the Civil Service Commission where a hearing was held. (The transcript of the hearing is a part of the record filed herewith and references thereto are designated: Tr. p. ....) At this hearing, the Xerox copies of the cards removed from petitioner's desk were, over objection of trial counsel, admitted in evidence. A further discussion of the evidence appears in the following section of this Petition.

Subsequent thereto, petitioner was served with a formal order of discharge. Appendix B, *infra*, p. 12. The order of the Civil Service Commission was affirmed, without written opinion, by the Court of Common Pleas of Lucas County, Ohio, Appendix B, *infra*, p. 13. The Court of Appeals for Lucas County affirmed, without written opinion, the Court of Common Pleas. Appendix B, *infra*, p. 14. As heretofore stated, an appeal as of right was dismissed by the Supreme Court of Ohio on April 13, 1966, and rehearing denied on May 11, 1966. The propriety of the admission of evidence obtained as the result of an unreasonable search and seizure was raised by assignment of error in the Court of Common Pleas and in the Court of Appeals, and was the basis for an appeal as of right to the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

Without the testimony of three witnesses who testified concerning the copies of the cards taken from petitioner's desk there would have been no testimony before the Civil Service Commission arising above the level of purest hear-

say upon which to base the order of discharge. Only four witnesses testified at the hearing. Allen Andrews, the Safety Director, testified as to two things—and every bit of it hearsay. He testified to what petitioner *told him* about how much she gambled, and to what Arthur Schuster *told him* about finding the cards in petitioner's desk. Arthur Schuster testified to searching the desk, taking the cards, and making Xerox copies of them. Daniel Perzynski, a Toledo police officer, was qualified as an expert on horse-racing and testified that, in his opinion, the notations on the copies of the cards indicated notes about horses, race tracks and amounts bet. Art Kwiatkowski, a police laboratory technician, testified as a handwriting expert to the effect that the notations on the copies were in petitioner's handwriting.

There is, therefore, in this case no room for application of the "harmless error" doctrine. Compare dissenting opinion in *Fahy v. Connecticut*, 375 US 85.

The search of an employee's desk, assigned to that employee's use, by police officers without a warrant and without employee's consent but with consent of employee's supervisors, is an unreasonable search and invasive of employee's constitutional right of privacy. *United States v. Blok*, 188 F2d 1019. If the employee's superiors cannot, by consenting thereto, validate a search by police, obviously they cannot themselves conduct a reasonable search without the employee's consent. In fact, the Court in *Blok*, at page 1021, said:

> "In the absence of a valid regulation to the contrary, Appellee was entitled to, and did, keep personal property of a personal sort in her desk. *Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office.*" (Emphasis added.)

A similar conclusion was reached by the court in *Villano v. United States*, 310 F2d 680. See also, *Jones v. United States*, 362 US 257, where this court refused "to import into the law surrounding the Constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, has been shaped by distinctions whose validity is largely historical."

Had an attempt been made to use the evidence thus obtained in a criminal prosecution against the petitioner in Ohio, it would have been inadmissible under the rule of *Mapp v. Ohio*, 367 US 643. The proceeding for removal of a Civil Service employee, although not in itself culminating in imprisonment, fine or other punishment usually associated with a criminal prosecution, has many of the aspects of a criminal proceeding. "Charges" must be filed against the employee whose discharge is sought and the employee must be found "guilty" of the charges in order to warrant discharge. This quasi-criminal aspect of the proceeding was recognized even by counsel for the City of Toledo when, in argument before the Civil Service Commission, he said:

> "Now, it's true the *accused* is entitled to know and be advised of the nature of the *charges* only. * * * (Tr. p. 18) It doesn't make the *charges* void in themselves, as long as the *accused* has sufficient notice to prepare a defense * * *. Those *charges* in no way take the accused by surprise * * * (Tr. p. 20)" (Emphasis added.)

Under the law of Ohio, since an order of removal constitutes a judgment, the reasons for the order of removal on the hearing of an appeal are considered as charges, and, as such, are strictly construed. *State ex rel. DesPrez v. Board of County Commissioners*, 47 Ohio App 1.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, as guaranteed by the Fourth Amendment, is not a right guaranteed in criminal prosecutions only. This court, in *Boyd v. United States*, 116 US 616, and again in *Mapp* when Mr. Justice Clark quoted from *Boyd*, recognized that the forfeiture of goods as a result of any forcible extortion of a man's private papers to be used as evidence is as well within the condemnation of the Fourth Amendment as is conviction of crime resulting therefrom. Petitioner had a job, and such privileges and immunities appurtenant thereto as were granted her by the Civil Service laws and procedure, including more than eleven years seniority in that job, all of which she was required to forfeit as the result of a forcible extortion of her private papers and their use against her in violation of the due process to which she is entitled.

The injunction of the Fourteenth Amendment prohibits a state or an arm thereof from abridging those privileges or immunities or from depriving any person of life, liberty or property without due process of law. It makes no distinction between civil and criminal cases. But at the core of the amendment is *state action*, and the Fourteenth Amendment condemns all state action denying due process of law, regardless of what department of the government is involved.

There are principles of law, established by this Court, which, when added to the principle established by *Mapp*, make all evidence illegally obtained inadmissible in any proceeding, whether civil or criminal. In *Burdeau v. McDowell*, 256 US 465, a civil suit brought to require the return of evidence, this Court held, with Justices Holmes and Brandeis dissenting, that a theft by an individual of a

person's private papers and the turning over of those private papers by the thief to a federal prosecutor did not violate the Fourth Amendment and prevent the use by federal agents of evidence thus unlawfully obtained by individuals. And it is probably clear that *Mapp* and *Elkins v. United States*, 346 US 206, standing alone, do not upset the ruling in *Burdeau*. However, *Elkins* and *Mapp* cannot be considered without regard to other basic principles of law which have direct application to *Burdeau*.

In *Buchanan v. Warley*, 245 US 60, a suit for specific performance of a contract for sale of real estate was defended by a Negro defendant on the ground that a municipal ordinance made it unlawful for him to occupy the house he had contracted to buy. The enforcement of that ordinance by a municipality was held to be *state action*, an interference by the state with property rights, and thus violative of the Fourteenth Amendment.

In *Shelley v. Kraemer*, 334 US 1, this Court held that racial restrictive covenants could not be enforced in equity against Negro purchasers, because such enforcement would be *state action* denying equal protection of the law. And in *Barrows v. Jackson*, 346 US 249, another civil action, this Court also held that the action of a state court in upholding the validity of a restrictive covenant would constitute *state action*.

Under *Buchanan*, if a city council enacted an ordinance making evidence illegally obtained by individuals admissible in a court of law or before a civil service commission, such enactment would be state action in violation of the Fourth and Fourteenth Amendments.

Under *Shelley* and *Barrows*, if a court of a state, or a municipal civil service commission, a quasi-judicial body, held that evidence illegally seized by individuals was ad-

missible against the person from whom it was seized such a holding would be state action in violation of the Fourth and Fourteenth Amendments.

It follows that since the admission of such evidence in a state court or administrative agency would be *state action*, the rule of *Mapp* is applicable and the admission of such evidence is prohibited by the Fourth and Fourteenth Amendments.

Since the key to the applicability of the Fourth and Fourteenth Amendments is state action, the distinction between civil and criminal cases becomes immaterial if not nonexistent and the rule of *Burdeau* has been effectively overruled by *Elkins* and *Mapp*. For once the State places itself behind illegal searches and seizures by admitting evidence so obtained, its behavior constitutes state action in violation of the federal Constitution just as much as it would be state action if it places itself behind racial restrictive covenants by enforcing them.

Whether the exclusionary rule as now set forth in *Mapp* applies to civil cases or matters before administrative bodies is in no wise clear under present lower court decisions. Compare, for example, *Rogers v. United States*, 97 F2d 691, where a civil judgment procured by evidence obtained in violation of the Fourth Amendment was held invalid, with *United States v. One 1956 Ford Tudor Sedan*, 253 F2d 725, where the court held that legal infirmities in seizure do not impair the right of the United States to condemn property used in violation of revenue laws.

This Court, however, has settled any possible confusion concerning the applicability of the Constitutional exclusionary rule to forfeiture cases by its decision in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 US 693. Whether the rule also applies to civil suits, quasi-

criminal proceedings or proceedings before state administrative bodies is still an open question.

That this question remains open was recognized by Mr. Justice Goldberg in his concurring opinion in *Cleary v. Bolger*, 371 US 392, when he said that "indeed, the effect of the Fourth Amendment in civil cases in the federal courts is not totally settled," and by Mr. Justice Brennan, in his dissenting opinion in the same case, when he said:

> "... while petitioner herein was enjoined from testifying in the state administrative proceeding against respondent, as well as in the criminal proceeding, it has not yet been settled whether Mapp applies to administrative proceedings."

This Court, and the other courts of our country, have carefully and painstakingly laid down guidelines for the protection of the rights of an accused criminal as those rights are guaranteed him by our Constitution. It is no less the obligation of our courts to protect the same guaranteed rights of a non-criminal faced with quasi-criminal charges.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. BELL,
100 East Broad Street,
Columbus, Ohio,
Counsel for Petitioner.

APPENDIX A

AMENDMENT IV—CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV—CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Order of Discharge

The Toledo Civil Service Commission

The Toledo Civil Service Commission after duly considering the testimony presented at the hearing of your appeal, affirms the judgment of the appointing authority in dismissing you from your position as Junior Clerk in the Division of Inspection as of July 20, 1964.

/s/ DONALD L. SMITH,
Secretary

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

KATHRYN GENITE,

Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, OHIO, ET AL.,

Appellees.

No. 197380

JOURNAL ENTRY

This day this cause came on to be heard upon appeal from the decision of The Civil Service Commission dismissing Appellant from her position as a Junior Clerk in the City of Toledo, Division of Inspection as of July 20, 1964, and the Court, being fully advised in the premises finds upon consideration of the entire record, the briefs and arguments of counsel, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the decision of the Civil Service Commission be and the same is hereby affirmed. Appellant to pay the costs of this action.

To all of which Appellant excepts.

/s/ GEORGE N. KIROFF,
Judge

/s/.....
ARTHUR WILKOWSKI,
Attorney for Appellant

/s/.....
FRANK T. PIZZA, Assistant
Law Director,
Attorney for Appellees

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. No. 6009
C. P. No. 197380

KATHRYN GENITE,

Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, OHIO, ET AL.,

Appellees.

JOURNAL ENTRY

This cause came on to be heard on appeal on questions of law and upon consideration of the record and assignments of error, the Court fails to find any error appearing on the record in the judgment and proceedings of the Court below prejudicial to the rights of the appellant, and the judgment is, therefore, affirmed, at appellant's costs and this cause is ordered remanded thereto for execution for costs.

All to which appellant excepts.

.....
Judge

APPROVED:

.....
ARTHUR WILKOWSKI,
Attorney for Appellant

.....
FRANK T. PIZZA,
Assistant Director of Law,
Attorney for Appellees

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1966 TERM
To wit:
Wednesday, April 13, 1966

No. 39989

KATHRYN GENITE,
Plaintiff-Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, ET AL.,
Defendants-Appellees.

APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Count sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 13th day of April, 1966

THOMAS L. STARTZMAN,
Clerk

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1966 TERM
To wit:
Wednesday, May 11, 1966

No. 39989

KATHRYN GENITE,
Plaintiff-Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO ET AL.,
Defendants-Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this ... day of ..... 19....

THOMAS L. STARTZMAN,
Clerk.

By.....
Deputy.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1966

KATHRYN GENITE,

Petitioner,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 12, 1966.

/s/ POTTER STEWART,
Associate Justice of the Supreme Court of the United States

Dated this 7th
day of July, 1966.

APPENDIX C
CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition was served upon Frank T. Pizza, Assistant Law Director, City of Toledo, counsel for Respondents, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him at his office address in the Safety Building, Toledo, Ohio.

James F. Bell

JAMES F. BELL,
Counsel for Petitioner

Office-Supreme Court, U.S.
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENTS IN OPPOSITION.

LOUIS R. YOUNG,
Director of Law,

FRANK T. PIZZA,
Assistant Director of Law,

JOHN J. BURKHART,
Chief Counsel,
Safety Building, Toledo, Ohio,
Attorneys for Respondents.

(Other Counsel on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

JAMES F. BELL,
100 East Broad Street,
Columbus, Ohio,
Counsel for Petitioner.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENTS IN OPPOSITION.

JURISDICTION.

The judgment of the Supreme Court of Ohio dismissing this appeal for want of a substantial constitutional question was entered on April 13, 1966. Appendix B, *infra,* page 12. Application for a rehearing was denied by the Supreme Court of Ohio on May 11, 1966. Appendix B, *infra,* page 13. Petitioner was granted additional time for filing a petition for a writ of certiorari to and including September 12, 1966, and respondents were granted an extension of time until November 7, 1966, to file a response to the petition for a writ of certiorari.